Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JUDITH A. NEMETH, DONALD J. NEMETH and JOHN L. VITALE,

Petitioners,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

ISSUE: May a State create a short statute of limitations within which an unconstitutional tax statute may be judicially attacked in order to avoid giving refunds?

RESTATEMENT OF THE ISSUE: Can the mere passage of time remedy an unconstitutional legislative tax act?

FURTHER RESTATEMENT OF THE ISSUE: If refund is sought of a facially unconstitutional tax, may the State interpose procedural impediments to a clear and certain remedy?

The decision below, based upon the holding in the *VICTOR CHEMICAL* case, conflicts with Florida Statutes and with this Court's decisions concerning Federal Due Process requirements as set forth in the *MCKESSON* and *NEWSWEEK* decisions.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, counsel for the Certified Class in *Leon v. Department of Revenue*, Case No. 96-0902-CA 23 (11th Jud. Cir., Dade County, Fla.) participated as *amicus curiae* in the Florida Supreme Court.

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The opinion of the Florida Supreme Court is reproduced in the appendix at Pet. App. 1. The opinion of the Florida Fourth District Court of Appeals is reported at 686 So.2d 778 (1997) and is reproduced in the appendix at Pet. App. 12. The opinions of the Nineteenth Judicial Circuit Court, in and for St. Lucie County, Florida are unreported and are reproduced in the appendix at Pet. App. 18 and 21.

JURISDICTION

The judgment of the Florida Supreme Court was rendered on April 8th, 1999 and became final 15 days thereafter. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTES INVOLVED

At the time the contested taxes were paid, pursuant to Section 320.072(1)(b), a facially unconstitutional tax, Section 215.26 Florida Statutes required taxpayers to file for refunds within three years of when the right to a refund *"accrued"* without any definition of "accrued" and without any mention of date of payment of the tax. Said Statute in force at the time of the payment of the tax by the class represented herein, is reproduced in pertinent part in the appendix at Pet. App. 23.

Said Section 320.072(1)(b) provided no pre-deprivation hearing, assessed a tax amount without regard to

value of the automobile and without regard to whether an automobile from outside Florida had a greater "impact" and provided a credit only for sales taxes paid to the State of Florida.

Thereafter, in 1995, and while *NEMETH* was pending, the Florida legislature passed an amendment to Section 215.26 Florida Statutes requiring taxpayers to file for refunds within three years of when the right to a refund *"accrued" or* within five years of date of payment of the tax [for taxes paid after September 30th, 1994, (apparently an arbitrary date)] and said Statute, as amended, is reproduced in pertinent part in the appendix at Pet. App. 24.

In 1996 the Florida legislature passed a bill, Chapter 96-243, Laws of Florida, authorizing refunds to the *NEMETH* class, without interest or attorney fee. A less than one year opportunity was afforded to aggrieved taxpayers within which to apply for refund, despite the fact that the 1995 amendment to Section 215.26, Florida Statutes, after 1995, allowed a three year window after "accrual" of right to refund, or the new five-years-after-payment to apply for a refund.

Florida Statutes, Section 95.11 (3) "Limitations," provides for a four year statute of limitations under the following circumstances:

"(d) An action to recover public money or property held by a public officer . . . "

"(m) An action for money paid to any governmental authority by mistake or inadvertence." and

"(p) Any action not specifically provided for in these statutes."

The Amended Complaint filed in the trial court was drafted after and closely follows the judicially-found constitutional defects set forth in the *KUHNLEIN* decisions and alleges that Section 320.072, Florida Statutes violates Article I, Section 8 (the Commerce Clause) of the United States Constitution and also violates Article IV, Section 2 (the Privileges and immunities Clause) and the Equal Protection guarantee of the United States Constitution.

It is also contended on behalf of the Petitioners that, to give refunds to the 600,000 *KUHNLEIN* class members, but not to give relief to the 100,000 members of the *NEMETH* class who were victimized by an almost identical unconstitutional statute, violates the Due Process and Equal Rights guarantees of the United States Constitution.

INTRODUCTION

The Florida Supreme Court below, in 1999, held for the first time, that aggrieved taxpayers no longer needed to first file claims with the State Comptroller as a condition precedent to instituting litigation. Prior to this holding, the file-a-claim-with-the-comptroller-first had been the standard and *pro forma* defense by the State of Florida.

Indeed, argument that claims must be first filed with the State Comptroller was the sole and only issue raised, in twelve different ways, by the State in its Brief before the Florida Supreme Court. On each and every such issue, although the court below found in favor of the taxpayer, nevertheless no relief was afforded for the improper taxation.

No claim was raised in the appeal by the State concerning an alleged three year statute of limitations within which a court action must be brought. The appeal only contested the failure to file-with-the-comptroller-first issue.

Because the refund statute (Section 215.26), until 1995, was silent on any mention of "date of payment," many courts throughout the State of Florida rendered conflicting decisions. The consternation and confusion of the Florida courts is set forth at great length in the decision appealed from. Accordingly, the holding below, in 1999, ultimately holds that aggrieved taxpayers *should have had* superior knowledge, in 1989-1990, than that possessed by the State of Florida and its agencies and that the unlawfully-taxed members of the public *should have* commenced litigation even though same was prohibited by the statute as then written.

The need for review is greater here because Florida, again, has imposed an improper and facially unconstitutional tax and refuses to grant refunds, without regard for the Federally-mandated Due Process requirements of the United States Constitution and those strictures and guidelines set forth by the United States Supreme Court, particularly as found in the *MCKESSON* and *NEWSWEEK* decisions.

Further, by passing, in 1996, a so-called refund statute for the *NEMETH* class of taxpayers, without provision for a reasonable attorney fee, Florida attempts to remove all possiblity for taxpayer legal representation except by public-service law firms. And by making no provision for interest on the $30,000,000.00 amount wrongfully taxed,

Florida was allowed, in effect and in fact, (because the State does not pay pre-judgment interest), to escape liability for an additional sum of about $21,600,000.00 in unpaid legal interest on the amount improperly taxed.

Said refund to the *NEMETH* class was half-hearted and did not appropriate enough money for a full refund to all class members and merely, without much publicity, granted hardly a one year period for applying for a refund, instead of the full three year window of opportunity set forth under the then existing law.

The legislature appropriated only $24,800,000.00 for *NEMETH* class refunds whereas over $30,000,000.00 had been raised by the illegal tax, but no appropriation was made for attorney's fees.

Because the state of Florida, even should a tax be found to be illegal, retains any money not refunded, the state, in effect and in fact receives an interest-free loan and keeps any unrefunded moneys improperly obtained, leaving the public unprotected.

STATEMENT OF FACTS

During the 1990 legislative session, the Florida Legislature enacted legislation [codified as Section 320.072(1)(b), Florida Statutes (1990)] that imposed a $295.00 impact fee "upon the initial application for registration of a motor vehicle" previously registered in another state, which affected about 100,000 taxpayers (the "*NEMETH* class"). The law remained effective from July 1, 1990 until June 30, 1991, when it was repealed and superceded by Section 319.231, Florida Statutes (1991)

which imposed a $295.00 impact fee upon initial "titling" of a motor vehicle, but otherwise contained identical language to the first Impact Fee statute. This later law affected about 600,000 taxpayers (the *KUHNLEIN* class) before it was summarily voided by the Florida courts in decision(s) dated November 30th, 1993, (Case # 92-6224, 9th Judicial Circuit. Trial) and September 29th, 1994 (646 So.2d 717 and 662 So.2d 308. Appeal).

Both statutes contained almost identical verbiage and both suffered from the same facially unconstitutional defects, consisting of discriminatory taxation in violation of the Equal Protection, Interstate Commerce and Due Process Clauses of the U.S. Constitution.

A Notice of Claim on behalf of the *NEMETH* class was filed in St. Lucie County Circuit Court pursuant to Section 768.21 Florida Statutes (which required six months notice before suit could be instituted), 16 days after the *KUHNLEIN* Trial Court's decision.

The *NEMETH* Complaint was filed in St. Lucie County, Florida, 8 days after the *KUHNLEIN* Florida Supreme Court decision.

Judith A. Nemeth moved to Florida with her husband Donald J. Nemeth in 1990. They each owned cars in their individual names. Both cars had been registered in New Jersey. Both Nemeths separately paid the $295.00 Impact Fee. John L. Vitale moved to Florida in late 1990 and, on January 7th, 1991, paid a $295.00 Impact Fee for his car which had previously been registered in New York. None of the named Class Representatives had filed

a refund request with the State of Florida before suit was initiated.

(Note: Neither of the Nemeths has received a refund. This question was asked by the court below during oral argument and it was answered flatly in the negative.)

COURSE OF THE PROCEEDINGS BELOW

Petitioners' initial Complaint, cast as a Class Action, challenged the constitutionality of Section 320.072(1)(b), Florida Statutes as a burden on interstate commerce. The Circuit Court, on motion duly made, by Order dated April 19th, 1995, dismissed the action but allowed Petitioners ten days within which to serve an amended complaint.

An amended complaint was timely served which renewed the previous challenge and also inserted causes of action based upon the decisions rendered in the *KUHNLEIN* case(s), alleging *per se* violation of the commerce, privileges and immunities, due process and equal protection clauses of the U.S. Constitution and for failure to provide an opportunity for a pre-deprivational hearing.

Another motion to dismiss was made and argued, following which the Circuit Court, by Order dated August 16th, 1995, dismissed Petitioners' amended complaint.

Petitioners filed a timely Notice of Appeal on September 5th, 1995. By decision dated January 22nd, 1996, the Florida Fourth District Court of Appeal reversed the

decision of the circuit court and certified the following question to the Florida Supreme Court as one of great public importance:

> WHETHER *DEPARTMENT OF REVENUE V. KUHNLEIN*, 646 So.2d 717 (Fla. 1994) OVERRULED OR RECEDED FROM *STATE EX REL. VICTOR CHEMICAL WORKS V. GAY*, 74 So.2d 560 (Fla. 1954) TO THE EXTENT THAT *VICTOR CHEMICAL* HOLDS THAT THE RIGHT TO A REFUND OF TAXES IS BARRED IF THE TAXPAYER FAILS TO MAKE A TIMELY CLAIM FOR A REFUND AS PROVIDED IN SECTION 215.26, FLORIDA STATUTES?

The Florida Supreme Court, by decision dated April 8th, 1999 (final 15 days thereafter) answered the certified question in the negative and quashed the decision of the Fourth District which had reversed the trial court's dismissal of the complaint.

The said Florida Supreme Court decision appealed from holds that suit had to be filed within a three year limit allegedly prescribed by section 215.26(2), despite the fact that the then statute requires action within three years only of accrual-of-the-right to refund, without mention of the date-of-payment as a reference point in time.

Petitioners had also argued that the term "accrued" includes the date of a judicial voiding of the tax as a commencement date for the running of the three year period, and cited Florida decisions to that effect.

The Petitioners also argued that the refund statute of 1996, running to the *NEMETH* class, constituted an act of admission of culpability by the State.

It was also contended by the Petitioners that the 1995 amendment to the refund statute which mentioned, for the first time, a period of 5 years from payment, was an admission and concession that the previous statute, making no mention of date-of-payment as a time reference point, was therefore not a bar to this action.

The decision appealed from expressly now holds that a Florida taxpayer may file directly in the appropriate court without filing an administrative claim pursuant to Section 215.26 so long as the sole basis claimed for the refund is that the tax is unconstitutional, as was the case herein.

The holding is contrary to the version of the statute in existence in 1990-1 and is also contrary to the later amendment to section 215.26 in 1995, which granted an opportunity to apply for a refund for up to five years after payment.

Although the holding of the Florida Supreme Court is adverse to the only issue raised by the State's appeal, no taxpayer relief is afforded.

Failing to grant meaningful backward looking relief in the form of actual refunds, the holding below is violative of the United States Constitution and also of the federally required dictates and mandates as set forth and described by the United States Supreme Court's decisions herein mentioned.

The decision appealed from is further defective inasmuch as it was rendered without regard for the holdings

in the ATLANTIC STATES LEGAL FOUND. V. EASTMAN KODAK, 933 F.2d 124 (2nd Cir.1991) and the several succeeding cases which held that one can, absent contrary evidence, infer that the existence of a citizen suit was a motive, incentive and/or catalyst for settlement (here, $24,800,000,00 in refunds were granted by statute) and therefore Petitioners are deemed, and should have been found to be, prevailing parties and are entitled to legal fees and costs.

To the same effect HEWITT V. HOLMS, 482 U.S. 755 (1987), and its progeny.

REASONS FOR GRANTING THE WRIT

A THE ISSUE PRESENTED HAS BROAD IMPORTANCE

Following the *KUHNLEIN* decisions, 600,000 taxpayers became entitled to refunds totalling about $180,000,000.00.

The *NEMETH* class taxpayers, about 98,000 persons, paid almost $30,000,000.00 in unlawful taxes, (only a fraction of which has actually been refunded) were victimized by a tax statute literally identical to that which was found by the Florida courts to be facially unconstitutional, yet the Florida Supreme Court, again, affords no relief.

The holding below indicates that federal due process requirements are met because the taxpayers have a theoretical right to retain almost 100,000 attorneys, each taxpayer spend over $200.00 dollars in court filing fees and

for service of process upon several state officials, in another part of the state, and 100,000 persons each file a separate lawsuit (100,000 separate suits) because, *maybe, just maybe* a $295.00 impact fee *might* be found to be illegal.

The Florida refund process is illusory and affords no actual monetary relief.

ISSUE: May a State create a short statute of limitations within which an unconstitutional tax statute may be judicially attacked in order to avoid giving refunds?

RESTATEMENT OF THE ISSUE: Can the mere passage of time remedy an unconstitutional legislative tax act?

We respectfully submit that sincere logical intellect, sense of justice, equity and constitutional requirements for Due Process, all compel us to answer this question in the negative.

Does not our jurisprudential imperative that "No-one may profit from his own wrong" apply to States which impose illegal taxes?

FURTHER RESTATEMENT OF THE ISSUE: If refund is sought of a facially unconstitutional tax, may the State interpose procedural impediments to a clear and certain remedy?

B THE DECISION BELOW, BASED UPON THE HOLDING IN THE *VICTOR CHEMICAL* CASE, CONFLICTS WITH THIS COURT'S DECISIONS CONCERNING FEDERAL DUE PROCESS REQUIREMENTS AS SET FORTH IN THE *MCKESSON* AND *NEWSWEEK* DECISIONS.

The 1954 Florida Supreme Court decision in *VICTOR CHEMICAL* suffers from two fatal defects:

1 The holding interprets the then refund statute to mean, in addition to "accrual," three years from "payment," when, in fact, the word "payment" is not evident anywhere in the statute. Is it reasonable to require that a citizen-taxpayer engage in esoteric legal research in order to learn that a court decision 27 years earlier had inserted language into a statute which still was not present in 1990?

2 More importantly, the *VICTOR CHEMICAL* holding does not comply with, nor consider in any way, the now-Federally-mandated requirements of the United States Constitution.

In *MCKESSON*, a 1990 Florida case, the United States Supreme Court clearly set forth the requirements which should be followed by the states concerning refunds of illegal taxes, holding that the due process clause of the Federal Constitution's Fourteenth Amendment required that the state must afford taxpayers meaningful retrospective relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional.

This Court in *MCKESSON* also firmly held that a clear, meaningful and certain remedy for any erroneous or illegal tax collection must be provided.

The *NEWSWEEK* case, yet another Florida tax case, decided by the United States Supreme Court in 1998, repeated the obligation upon States to provide a remedial scheme which is not only "clear and certain," but also that a State may not "bait and switch" in order to prevent refunds.

CONCLUSION

Petitioners respectfully request that the petition for a writ of certiorari be granted. In the alternative, petitioners request this Court to summarily reverse the Florida Supreme Court's decision for further consideration in light of MCKESSON CORP. V. DIVISION OF ALCOHOLIC BEVERAGES, 496 U.S. 18 (1990) and NEWSWEEK, INC. V. FLORIDA DEPARTMENT OF REVENUE, 118 U.S. 904 (1998) and an award of legal fees.

Respectfully submitted,

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APPENDIX

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Supreme Court of Florida

DEPARTMENT OF REVENUE, et al.,
Petitioners,

vs.

JUDITH A. NEMETH, DONALD J. NEMETH, et al.,
Respondents.

No. 89,909
[April 8, 1999]

PER CURIAM.

We have for review *Nemeth v. Department of Revenue*, 686 So. 2d. 778 (Fla. 4th DCA 1997), in which the district court certified the following question as one of great public importance:

> WHETHER *DEPARTMENT OF REVENUE V. KUHNLEIN*, 646 So. 2d. 717 (Fla. 1994), OVERRULED OR RECEDED FROM *STATE EX REL. VICTOR CHEMICAL WORKS V. GAY*, 74 So. 2d. 560 (Fla. 1954), TO THE EXTENT THAT *VICTOR CHEMICAL* HOLDS THAT THE RIGHT TO A REFUND OF TAXES IS BARRED IF THE TAXPAYER FAILS TO MAKE A TIMELY CLAIM FOR REFUND AS PROVIDED IN SECTION 215.26, FLORIDA STATUTES?

Id. at 780. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We answer the certified question in the negative except we expressly hold that a taxpayer's claim based solely upon the tax being unconstitutional may be filed in the appropriate court rather than with the Comptroller.

However, because respondents Judith and Donald Nemeth[1] (Nemeths) failed to file suit challenging the constitutionality of section 320.072(1)(b) within the three-year time limit prescribed by section 215.26(2), Florida Statutes (Supp. 1994), we quash the district court's decision reversing the trial court's order of dismissal with prejudice.

MATERIAL FACTS AND PROCEEDINGS BELOW

The Nemeths filed a complaint, individually and on behalf of a class of others similarly situated, challenging the constitutionality of section 320.072(1)(b), Florida Statutes (Supp. 1990).[2] The Nemeths also sought a refund from the Department of Revenue (DOR), the petitioner in this case, for the taxes paid pursuant to the statute. DOR filed a motion to dismiss the complaint, alleging that the

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[1] The respondents, plaintiffs below, are the *Nemeths* and others who, like the Nemeths, paid an impact fee pursuant to section 320.072(1)(b), Florida Statutes (Supp. 1990). For ease of reference, the respondents will be referred to collectively as "the Nemeths."

[2] Section 320.072(1)(b), which was effective from July 1, 1990, to June 30, 1991, provided:

> (b) In addition to the fee imposed by paragraph (a), there is imposed an additional $295 impact fee upon the initial application for registration pursuant to s. 320.06 of every motor vehicle classified in s. 320.08(2), (3), and (9)(c) and (d).

In 1991, section 320.072(1)(b) was repealed and superseded by section 319.231. Ch. 91-82, § 9, Laws of Fla. This Court held the impact fee imposed pursuant to section 319.231 unconstitutional and thus void from its inception in *Department of Revenue v. Kuhnlein*, 646 So. 2d. 717 (Fla. 1994).

Nemeths failed to comply with section 215.26. Relying on this Court's decision in *Victor Chemical,* DOR contended that the Nemeths had not filed for a refund with the Comptroller or its agent, and consequently the court lacked jurisdiction to hear the case. Additionally, DOR alleged that pursuant to section 215.26(2), the Nemeths could no longer seek a refund from the Comptroller because more than three years had elapsed since the date of each respondent's payment. Section 215.26(2) requires a taxpayer to file an application for a refund within three years after the right to such refund accrues.[3] Under *Victor Chemical,* the right to the refund accrued on the date the Nemeths paid the tax. 74 So. 2d. at 562.

The trial court in this case dismissed the complaint[4] for failure to allege a timely claim for refund as required by section 215.26(2). The trial court reasoned:

> In my view, [section] 215.26 Fla. Stat. must be considered in light of *State ex rel. Victor Chemical Works v. Gay,* 74 So. 2d. 560 (Fla. 1954). Of course that court dealt with a prior version of Section 215.26 and the facts involved the failure to file an application for a refund. In *Department of Revenue v. Kuhnlein,* 646 So. 2d. 717 Florida's

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[3] "Application for refunds as provided by this section must be filed with the Comptroller, except as otherwise provided in this subsection, within 3 years after the right to the refund has accrued or else the right is barred." § 215.26(2), Fla. Stat. (Supp. 1994).

[4] The trial court initially dismissed the Nemeths' complaint without prejudice based on section 215.26 and *Victor Chemical.* The Nemeths thereafter filed an amended complaint which the court also dismissed.

> Supreme Court discounted the necessity to file a formal refund application.
>
> Nonetheless, *Kuhnlein* did not overrule *Victor Chemical*'s decision that 215.26(2) was a non-claim statute. There is a substantial difference between a non-claim statute and a statute of limitations.
>
> Even though I may feel it is unfair to treat the Plaintiffs and proposed class plaintiffs in this case differently from those who were afforded relief in *Kuhnlein*, I have a duty to follow the law as construed by appellate courts. Notwithstanding the equities, I conclude that *Victor Chemical* controls.

Nemeth, 686 So. 2d. at 778-79.

On appeal, the district court reversed and remanded based on our decision in *Kuhnlein*. The district court held that *Victor Chemical*, which barred a taxpayer's claim because the taxpayer failed to satisfy the requirements of a prior version of section 215.26, was not applicable to the instant case in light of *Kuhnlein*. In particular, the court relied upon the following language in *Kuhnlein*:

> Initially, the State argues that the various plaintiffs below lacked standing to pursue this case because they either have not paid the fee or have not requested a refund of any fee paid. We note that the trial court rejected the State's factual contentions with respect to some appellants, and the record adequately supports the judge's findings. We also do not believe there is any requirement that the plaintiff must pay the fee or request a refund, at least in the present case. The fact that these plaintiffs face penalties for failure to pay an allegedly unconstitutional

> tax is sufficient to create standing under Florida law.

Nemeth, 686 So. 2d. at 779-80 (quoting *Kuhnlein*, 646 So. 2d. at 720). Notwithstanding its decision, the Fourth District certified to this Court the question referred to above as one of great public importance. *Nemeth*, 686 So. 2d. at 780.

LAW AND ANALYSIS

Like the trial court and district court in this case, Florida's district courts appear to be in disagreement over whether *Kuhnlein* altered the decision in *Victor Chemical* and, consequently, the refund process established by section 215.26. Some courts have read *Kuhnlein* as creating an exception to the general rule that requires a party first to seek and be denied a tax refund before filing suit for a refund. *See Nemeth; Public Medical Assistance Trust Fund v. Hameroff*, 689 So. 2d. 358 (Fla. 1st DCA 1997). Other courts have held in accord with *Victor Chemical* that a taxpayer must file a claim for a refund pursuant to section 215.26 before invoking the jurisdiction of the court. *See State Department of Revenue v. Bauta*, 691 So. 2d. 1173 (Fla. 3d DCA 1997); *Westring v. Department of Revenue*, 682 So. 2d. 171 (Fla. 3d DCA), *review denied*, 686 So. 2d. 583 (Fla. 1996).

Kuhnlein and *Victor* Chemical

While *Kuhnlein* and *Victor Chemical* appear to be in conflict on the issue of whether a party must first seek and be denied a tax refund before filing suit for a refund, we find the cases distinguishable. At bottom, the most significant distinction is that the plaintiffs in *Kuhnlein*,

unlike the plaintiffs in *Victor Chemical*, challenged the constitutionality of an involuntarily paid tax within the time limits prescribed by the applicable version of section 215.26, Florida Statutes. In *Victor Chemical*, a taxpayer brought a mandamus action seeking a refund of taxes that had been voluntarily paid under a statute that had been held invalid in a prior decision. 74 So. 2d. at 561. We held that the taxpayer's right to a refund under section 215.26 accrued upon payment of the tax rather than at the time the tax was declared illegal. *Id.* at 562. Therefore, we found the claim barred because the taxpayer failed to file for a refund with the Comptroller within one year of the payment as provided for in the controlling version of section 215.26. *Id.* at 565.

On the other hand, in *Kuhnlein* we rejected DOR's argument that class members could not seek a refund of a vehicle impact fee because they failed to comply with the requirements in section 215.26. 646 So. 2d. at 720. Despite the failure of the class members to apply for a refund from the Comptroller in accordance with the statute, we concluded that they could proceed with the class action challenge of the tax and sue for a refund. *Id.* at 721. Our decision established that in cases where the plaintiff is challenging the constitutionality of an involuntarily paid tax and seeking a refund for the same the taxpayer need not comply with the "administrative" requirements in section 215.26. *Id.* However, while our decision did not squarely address or extend to the time requirements in section 215.26(2), nonetheless the class members there sought a refund within the mandated three-year period. Here, the class members did not.

Future Claims

In order to avoid the recurrence of this issue in similar situations in the future,[5] we expressly hold that a Florida taxpayer may file directly in the appropriate court without filing an administrative claim pursuant to section 215.26 if the sole basis claimed for the refund is that the tax is unconstitutional. We recognize that the Comptroller cannot declare a tax unconstitutional, and thus, when the claim is solely that the refund is required because the tax is unconstitutional, to file the claim with the Comptroller would be a futile act.[6]

The claim based solely upon the constitutionality of the tax must be commenced by filing in the appropriate court[7] within the time requirements set forth in section

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[5] Somewhat to our surprise, we were informed at oral argument that the Nemeths have received refunds of their $295 impact fee, presumably as a result of a legislative claims bill. *See* ch. 96-243, Laws of Fla. (1996). That act became law on May 28, 1996, and was effective until May 28, 1997. In the claims bill itself, the legislature directed the Department of Highway Safety and Motor Vehicles to establish a refund program for taxes paid pursuant to section 320.072(1)(b), Florida Statutes (Supp. 1990), between July 1, 1990, and June 30, 1991. *Cf. State ex rel. Butterworth v. Kenny*, 714 So. 2d. 404, 406 n.2 (Fla. 1998) (citing well-settled rule that "mootness does not destroy appellate court's jurisdiction when questions raised are of great public importance or likely to recur"); *Rivera v. Singletary*, 707 So. 2d. 326, 327 n.6 (Fla. 1998) (same); *Holly v. Auld*, 450 So. 2d. 217, 233 n.1 (Fla. 1984) (same).

[6] If the refund is claimed on any other basis, there must be compliance with section 215.26, and this decision in no way alters that requirement.

[7] *See* Florida Rule of Civil Procedure 1.050 (1998) (providing in pertinent part that "[e]very action of a civil nature

215.26(2), that is, "within 3 years after the right to refund has accrued." Our holding in *Kuhnlein* did not eliminate the need to comply with the time requirements in section 215.26. Instead, we merely found that meeting the administrative requirements of section 215.26 was unnecessary. 646 So. 2d. at 720. Therefore, we now explicitly hold that a plaintiff challenging the constitutionality of a tax statute and seeking a refund, while not required to file with the Comptroller, must still file suit within three years of payment as required by section 215.26(2).[8]

We recognize that our holding appears to conflict with section 215.26(4), which provides that the statute is "the exclusive procedure and remedy for refund claims between individual funds and accounts in the State Treasury." However, we find no inconsistency because the statute is only the exclusive remedy for tax refunds which

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shall be deemed commenced when the complaint or petition is filed").

[8] In this manner, we conform our decision to our holding in *Reynolds Fasteners, Inc. v. Wright*, 197 So. 2d. 295, 298 (Fla. 1967), that "a taxpayer seeking refund of tangible personal property taxes illegally or improperly collected must proceed within the three-year limitation period prescribed in Sec. 95.11(5)(e)." Although dealing with Florida's statute of limitations, section 95.11, in reaching our decision, we cited approvingly the First District's construction of section 215.26 in *Florida Livestock Board v. Hygrade Food Products Corp.*, 145 So. 2d. 535 (Fla. 1st DCA 1962). Specifically, we agreed with the First District's holding that "[s]ince Hygrade failed to exhaust its administrative remedy by filing an application for refund of the inspection fees paid by it pursuant to the provisions of and within the time required by the statute, its right to the relief prayed for in its complaint is barred." *Reynolds Fasteners*, 197 So. 2d. at 297 (quoting *Florida Livestock*, 145 So. 2d. at 538).

the Comptroller is actually empowered to make, such as refunds for overpayment, section 215.26(1)(a); when no tax is due, section 215.26(1)(b); or for payments made in error, section 215.26(1)(c); but not for taxes that might violate the constitution.

Federal Due Process Requirements

When the requirements outlined above are met, as they were in *Kuhnlein*, we conclude that the failure to comply with the "administrative" prerequisites of section 215.26 does not preclude the action. While this result is not mandated by federal law, we believe federal law permits it. The United States Supreme Court has held that due process requires states to provide meaningful backward-looking relief or a clear and certain remedy when they place taxpayers under duress to pay a tax ultimately found unconstitutional. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990).

We find that section 215.26 provides adequate post-deprivation relief so as to comport with federal due process standards. We reach this conclusion primarily because *McKesson* refers to section 215.26 as an example of a statute that imposes permissible procedural requirements on post-deprivation relief. 496 U.S. at 45 n.28; *see also Newsweek, Inc. v. Florida Department of Revenue*, 118 S.Ct. 904, 905 (1998) (noting that Court has interpreted section 215.26 as providing "a postpayment remedy"). Additionally, the Court recognized in *Reich v. Collins*, 513

U.S. 106 (1994), that Georgia's tax refund statute,[9] which is similar to section 215.26, provided a clear and certain post-deprivation remedy. *Id.* at 111. Moreover, other jurisdictions with like statutes have found them in accord with the due process requirements outlined in *McKesson*. *See, e.g., Commonwealth Revenue Cabinet v. Gossum*, 887 S.W.2d 329 (Ky. 1994); *American States Insurance Co. v. State Dep't of Treasury*, 560 N.W.2d 644 (Mich. Ct. App. 1996); *Marx v. Broom*, 632 So. 2d. 1315 (Miss. 1994); *Atkins v. Department of Revenue*, 894 P.2d 449 (Or. 1995); *Stone v. Errecart*, 675 A.2d 1322 (Vt. 1996).

As a final comment, the Court noted in *McKesson* that "the State is free . . . to provide broader relief as a matter of state law than is required by the Federal Constitution." 496 U.S. at 52 n.36. In the end, we believe that Florida, as evidenced by our decision in *Kuhnlein*, not only satisfies *McKesson's* due process requirements but indeed provides broader post-deprivation relief to taxpayers who meet the requirements outlined above.

CONCLUSION

We answer the certified question in the negative, quash the Fourth District's decision reversing the trial court's order of dismissal with prejudice, and remand this case for proceedings consistent herewith.

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[9] "A claim for refund of a tax or fee erroneously or illegally assessed and collected may be made by the taxpayer at any time within three years after the date of the payment of the tax or fee to the commissioner." Ga. Code Ann. § 48-2-35(b)(1) (Supp. 1998).

It is so ordered.

HARDING, C.J., SHAW, WELLS and ANSTEAD, JJ., and OVERTON, Senior Justice, concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

Application for Revenue of the Decision of the District Court of Appeal – Certified Great Public Importance

Fourth District – Case No. 95-3096

(St. Lucie County)

Robert A. Butterworth, Attorney General, and Eric J. Taylor, Assistant Attorney General, Tallahassee, Florida, and Josephine A. Schultz, Assistant General Counsel, Office of the Comptroller, Tallahassee, Florida,

for Petitioners

Frederick D. Hatem, Port St. Lucie, Florida,

for Respondents

Stephen J. Bronis and Sharon L. Kegerreis of Zuckerman, Spaeder, Taylor & Evans, LLP, Miami, Florida, and G. Richard Strafer of Quinon & Strafer, P.A., Miami, Florida,

for the Certified Class in *Leon v. Department of Revenue*, Case No. 96-0902-CA 23 (Fla. 11th Cir. Ct., Dade County), Amicus Curiae

---

(reported as 686 So. 2nd 778, 1997)

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 1997

JUDITH A. NEMETH, DONALD J. NEMETH and JOHN L. VITALE, both individually and on behalf of all others similarly situated,

Appellants,

v.

FLORIDA DEPARTMENT OF REVENUE, et al.,

Appellees.

CASE NO. 95-3096

Opinion filed January 22, 1997

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Scott M. Kenney, Judge; L.T. Case No. 94-1144 CA 17.

Frederick D. Hatem, Port St. Lucie, for appellants.

Robert A. Butterworth, Attorney General, and Eric J. Taylor, Assistant Attorney General, Tallahassee, for appellees.

DELL, J.

Appellants, individually and on behalf of a class of others similarly situated, appeal from an order of dismissal with prejudice and final judgment entered on their amended complaint. Appellants challenge the constitutionality of the Florida Vehicle Impact Fee, section

320.072(1)(b), Florida Statutes (Supp. 1990), and seek a refund of the taxes paid under the statute. Appellants contend that the trial court erred in dismissing their complaint with prejudice because they failed to allege that they had filed a claim for refund as required by section 215.26(2), Florida Statutes (Supp. 1994).[1] Appellants argue that *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994) controls this case, and that *State ex rel. Victor Chemical Works v. Gay*, 74 So. 2d 560 (Fla. 1954) does not apply to their claims. We agree and reverse and remand this cause for further proceedings.

The trial court stated in its order of dismissal:

> In my view Sex. 215.26(2) Fla. Stat. (sic) must be considered in light of *State ex rel. Victor Chemical Works v. Gay*, 74 So. 2d 560 (Fla. 1954). Of course that court dealt with a prior version of Section 215.26 and the facts involved the failure to file an application for a refund. In *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994), Florida's Supreme Court discounted the necessity to file a formal refund application.
>
> Nonetheless, *Kuhnlein* did not overrule *Victor Chemical's* decision that 215.26(2) was a non-claim statute. There is a substantial difference between a non-claim statute and a statute of limitations.
>
> Even though I may feel it is unfair to treat the Plaintiffs and proposed class plaintiffs in this case differently from those who were

---

[1] Section 215.26(4), Florida Statutes (Supp. 1994), provides "the exclusive procedure and remedy for refund claims between individual funds and accounts in the State Treasury."

afforded relief in *Kuhnlein*, I have a duty to follow the law as construed by appellate courts. Notwithstanding the equities, I conclude that *Victor Chemical* controls.

In *Victor Chemical*, the supreme court explained:

> F.S. Section 215.26, F.S.A., is not, strictly speaking, a statute of limitations but is more in the nature of a statute of non-claim. The application for refund is required to be made within one year after the right to such refund shall have accrued and if no application has been made, the right to any refund shall be barred.
>
> . . . .
>
> In short it is the universal rule that a statute of non-claim runs from the time the taxes are paid and is not postponed until the legality of the tax has been judicially determined. 84 C.J.S., Taxation, § 639(c).

Id. at 562. The supreme court also rejected the argument that the taxpayers could not claim a refund because they did not know of the right to do so until the legality of the tax had been determined:

> It is strongly urged by the relator that he could not file claim for refund because he did not know that his right to do so had accrued until there was a final determination of the legality of the tax by this Court. This contention is without merit.
>
> . . . .
>
> The tax payer had the right to pay the tax and then seek refund after it was paid and bring a mandamus action to have the validity of the statute tested and to direct a refund of the taxes

> paid. The taxpayer was not required to wait until some stranger to him brought a proceeding to test the validity of the statute. It could have brought a single proceeding to determine the validity of the tax and for a refund. It knew that the tax had been imposed. It knew that it had paid the tax. It knew that it had the right to file an application for refund and if brought in time, a mandamus proceeding is one of the correct proceedings to determine the validity of the tax. It failed to file any claim or take any action within one year of the time of the payment[2] which is the time of the accrual of the right in this case and the claim involved is now barred by F.S. Section 215.26, F.S.A.

Id. at 564-65. We would affirm the trial court's order but for the supreme court's holding in *Kuhnlein*.

In *Kuhnlein*, the supreme court addressed a claim for refund of impact fees under a statute nearly identical to that considered sub judice. The supreme court held that persons who paid the impact fee pursuant to section 319.231, Florida Statutes (1991)[3] had standing to challenge the constitutionality of the statute and seek a refund for the taxes paid. It appears that the state argued in *Kuhnlein*, as it does here, that persons who sought a refund of fees lacked standing because they failed to

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[2] Section 215.26 has been amended to provide a three-year time limitation for filing of claims for refund.

[3] Section 319.231, Florida Statutes (1991) repealed and superseded section 320.072(1)(b). Section 319.231 imposed a $295.00 impact fee upon initial titling of a motor vehicle as opposed to its predecessor, section 320.072(1)(b) which imposed the $295.00 impact fee upon registration.

comply with section 215.26, Florida Statutes (1993) by first filing a claim for refund with the Comptroller. The supreme court dispensed with the state's argument by stating:

> Initially, the State argues that various plaintiffs below lacked standing to pursue this case because they either have not paid the fee or have not requested a refund of any fee paid. We note that the trial court rejected the State's factual contentions with respect to some appellants, and the record adequately supports the judge's findings. We also do not believe there is any requirement that the plaintiff must pay the fee or request a refund, at least in the present case. The fact that these plaintiffs face penalties for failure to pay an allegedly unconstitutional tax is sufficient to create standing under Florida law.

Id. at 720.

Accordingly, we hold that this case must be reversed on the authority of *Kuhnlein*. However, we consider the applicability of section 215.26, Florida Statutes, to claims for refund of taxes paid to be a question of great public importance. We therefore certify the following question:

> WHETHER *DEPARTMENT OF REVENUE V. KUHNLEIN*, 646 So. 2d 717 (Fla. 1994) OVERRULED OR RECEDED FROM *STATE EX REL. VICTOR CHEMICAL WORKS V. GAY*, 74 So. 2d 560 (Fla. 1954) TO THE EXTENT THAT VICTOR CHEMICAL HOLDS THAT THE RIGHT TO A REFUND OF TAXES IS BARRED IF THE TAXPAYER FAILS TO MAKE A TIMELY CLAIM FOR REFUND AS PROVIDED IN SECTION 215.26, FLORIDA STATUTES?

Accordingly, we reverse and remand this cause for further proceedings.

REVERSED and REMANDED; QUESTION CERTIFIED.

KLEIN and STEVENSON, JJ., concur.

IN THE CIRCUIT COURT
OF THE NINETEENTH
JUDICIAL CIRCUIT IN AND FOR
ST. LUCIE COUNTY, FLORIDA.

CASE NO. 94-1144CA17

JUDITH A. NEMETH et al.

Plaintiff(s),

vs.

FLORIDA DEPARTMENT
OF REVENUE; et al.

Defendant(s)

_____/

ORDER OF DISMISSAL AND FINAL JUDGMENT

This Matter was heard on a Defendants' Motion To Dismiss. I have considered the Motion, record, arguments of counsel and am otherwise advised in the premises.

In my view Sex. [sic] 215.26(2) Fla. Stat. must be considered in light of *State ex rel. Victor Chemical Works v. Gay*, 74 So. 2d 560 (Fla. 1954). Of course that court dealt with a prior version of Section 215.26 and the facts involved the failure to file an application for a refund. In *Department of Revenue v Kuhnlein*, 646 So. 2d 717 (Fla. 1994), Florida's Supreme Court discounted the necessity to file a formal refund application.

Nonetheless, *Kuhnlein* did not overrule *Victor Chemical's* decision that 215.26(2) was a non-claim statute. There is a substantial difference between a non-claim statute and a statute of limitations.

Even though I may feel it is unfair to treat the Plaintiffs and proposed class plaintiffs in this case differently from those who were afforded relief in *Kuhnlein*, I have a duty to follow the law as construed by appellate courts. Notwithstanding the equities, I conclude that *Victor Chemical* controls.

Plaintiffs acknowledge they can not otherwise satisfy my concerns and offered to have this case immediately certified for appeal. A Circuit Judge can not certify a case for appellate consideration. However, I can make a final determination which will enable an appeal.

Based upon the foregoing, it is thereupon,

ORDERED AND ADJUDGED as follows:

1. Defendants' Motion is granted and this case is dismissed with prejudice.

2. Plaintiffs shall have and take nothing from Defendants, who shall go hence without day. [sic]

3. Jurisdiction is reserved to consider court costs as necessary and proper.

DONE AND ORDERED at Fort Pierce, St. Lucie County, Florida, this 15th day of August 1995.

/s/ Scott M. Kenney
SCOTT M. KENNEY,
CIRCUIT JUDGE

Copies To:
Frederick D. Hatem, Esq.
Eric J. Taylor, Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a conformed copy of the foregoing has been furnished to the above-stated attorneys or pro se parties via first class, postage prepaid mail at the most recent address listed in the Court File or to the Courthouse box for local attorneys, this 16th day of Aug., 1995.

/s/ Myra Eldridge
Judicial Assistant

IN THE CIRCUIT COURT
OF THE NINETEENTH
JUDICIAL CIRCUIT IN AND FOR
ST. LUCIE COUNTY, FLORIDA.

CASE NO. 94-1144CA17

JUDITH A. NEMETH et al.

Plaintiff(s),

vs.

FLORIDA DEPARTMENT
OF REVENUE; et al.

Defendant(s)
_____/

ORDER ON MOTION TO DISMISS

This Matter was heard on a Motion To Dismiss filed by all Defendants. I have considered the Motion, record, arguments of counsel and am otherwise advised in the premises.

It is thereupon,

ORDERED AND ADJUDGED as follows:

1. Based upon Sec. 215.26, Fla. Stat. and *State ex rel. Victor Chemical Works v Gay*, 74 So. 2nd 560 (Fla. 1954), this case is dismissed without prejudice.

2. Plaintiffs shall have ten (10) days to file an amended complaint and the Defendants shall have ten (10) days thereafter to respond. If no amended complaint is filed within the required time, the case shall be deemed as dismissed with prejudice.

DONE AND ORDERED at Fort Pierce, St. Lucie County, Florida, this 18th day of April, 1995.

/s/ Scott M. Kenney
SCOTT M. KENNEY,
CIRCUIT JUDGE

Copies To:
Frederick D. Hatem, Esq.
Eric J. Taylor, Ass't. Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a conformed copy of the foregoing has been furnished to the above-stated attorneys or pro se parties via first class, postage prepaid mail at the most recent address listed in the Court File or to the Courthouse box for local attorneys, this 18th day of April, 1995.

/s/ Myra Eldridge
Judicial Assistant

(PRE – 1995)

215.26. Repayment of funds paid into State Treasury through error

(1) The comptroller of the state may refund to the person who paid same, or his heirs, personal representatives or assigns, any moneys paid into the state treasury which constitute:

(a) An overpayment of any tax, license or account due;

(b) A payment where no tax, license or account is due; and

(c) Any payment made into the state treasury in error;

and if any such payment has been credited to an appropriation, such appropriation shall at the time of making any such refund, be charged therewith. There are appropriated from the proper respective funds from time to time such sums as may be necessary for such refunds.

(2) Application for refunds as provided by this section must be filed with the Comptroller, except as otherwise provided in this subsection, within 3 years after the right to the refund has accrued or else the right is barred.

* * *

(1995 AMENDMENT)

215.26. Repayment of funds paid into State Treasury through error

(1) The Comptroller of the state may refund to the person who paid same, or his or her heirs, personal representatives, or assigns, any moneys paid into the State Treasury which constitute:

(a) An overpayment of any tax, license, or account due;

(b) A payment where no tax, license or account is due; and

(c) Any payment made into the State Treasury in error;

and if any such payment has been credited to an appropriation, such appropriation shall at the time of making any such refund, be charged therewith. There are appropriated from the proper respective funds from time to time such sums as may be necessary for such refunds.

(2) Application for refunds as provided by this section must be filed with the Comptroller, except as otherwise provided in this subsection, within 3 years after the right to the refund has accrued or else the right is barred. Except as provided in chapter 198 and § 220.23, an application for a refund of a tax enumerated in § 72.011, which tax was paid after September 30, 1994, must be filed with the Comptroller within 5 years after the date the tax is paid. The

* * *

319.231 Additional fee imposed on certain motor vehicle title or registration-only transactions. –

(1) An impact fee of $295 is imposed on each original certificate of title issued for a motor vehicle previously titled outside of this state. The fee, which shall be deposited into the General Revenue Fund, shall not be refundable unless it is paid in error.

(2) The fee imposed by subsection (1) shall not apply to:

(a) Service-providing vehicles of those not-for-profit organizations which qualify for an exception with respect to the purchase of a motor vehicle or mobile home under the provisions of § 212.08.

(b) The title application for any motor vehicle owned by and operated exclusively for the personal use of:

1. Any member of the United States Armed Forces, or his spouse or dependent child, who is not a resident of the state and who is stationed in this state while in compliance with military orders.

2. Any former member of the United States Armed Forces, or his spouse or dependent child, who purchased such motor vehicle while stationed outside of Florida or who purchased the vehicle prior to departing the state, who has separated from the Armed Forces and was not dishonorably discharged or discharged for bad conduct, who was a resident of this state at the time of enlistment and at the time of discharge, and who applies for registration of such motor vehicle within 6 months after discharge.

3. Any member of the United States Armed Forces, or his spouse or dependent child, who was a resident of this state at the time of enlistment, who purchased such motor vehicle while stationed outside of Florida or who purchased the vehicle prior to departing the state, and who is now reassigned by military order to this state.

4. Any spouse or dependent child of a member of the United States Armed Forces who loses his life while on active duty or who is listed by the Armed Forces as "missing-in-action." Such spouse or child must be a resident of this state and the serviceman must have been a resident of this state at the time of enlistment. Registration of such motor vehicle must occur within 1 year of the notification of the serviceman's death or of his status as "missing-in-action."

(c) Title applications where a reassignment is being made by a licensed Florida motor vehicle dealer.

(d) The titling of any motor vehicle owned or exclusively operated by the state or by any country, municipality, or other governmental entity.

(e) The titling of a truck defined in § 320.08(3)(d).

(f) The titling of any motor vehicle 25 model years old or older.

(g) The titling of a motor vehicle owned by any organization or person exempt under the provisions of § 320.0655(2), § 320.084(1), § 320.0841, § 320.0842(1), § 320.089(2), § 320.0893, or § 320.10.

(h) Persons applying for temporary registration plates pursuant to § 320.1325, unless permanent registration is applied for.

(3) The fee imposed by subsection (1) shall also be imposed on vehicles processed using the "registration-only" procedure, and payment of such fee shall be identified and retained in the motor vehicle registration records. However, the exemptions listed in subsection (2) shall also apply.

320.072 Additional fee imposed on certain motor vehicle registration transactions. –

(1) A fee of $100 is imposed upon the initial application for registration pursuant to § 320.06 of every motor vehicle classified in § 320.08(2), (3), and (9)(c) and (d).

(2) The fee imposed by subsection (1) shall not apply to:

(a) Any registration renewal transaction.

(b) A transfer or exchange of a registration license plate from a motor vehicle that has been disposed of to a newly acquired motor vehicle pursuant to § 320.0609(2) or (5).

(c) Any initial registration resulting from transfer of title between coowners as provided by § 319.22, transfer of ownership by operation of law as provided by § 319.28, or transfer of title from a person to a member of that person's immediate family as defined in § 657.002.

(d) The registration of any motor vehicle owned by and operated exclusively for the personal use of:

1. any member of the United States Armed Forces, or his spouse or dependent child, who is not a resident of this state and who is stationed in this state while in compliance with military orders.

2. Any former member of the United States Armed Forces, or his spouse or dependent child, who purchased such motor vehicle while stationed outside of Florida, who has separated from the Armed Forces and was not dishonorably discharged or discharged for bad conduct, who was a resident of this state at the time of enlistment

and at the time of discharge, and who applies for registration of such motor vehicle within 6 months after discharge.

3. Any member of the United States Armed Forces, or his spouse or dependent child, who was a resident of this state at the time of enlistment, who purchased such motor vehicle while stationed outside of Florida, and who is now reassigned by military order to this state.

4. Any spouse or dependent child of a member of the United States Armed Forces who loses his life while on active duty or who is listed by the Armed Forces as "missing-in-action." Such spouse or child must be a resident of this state and the serviceman must have been a resident of this state at the time of enlistment. Registration of such motor vehicle must occur within 1 year of the notification of the serviceman's death or of his status as "missing-in-action."

(e) The registration of any motor vehicle owned or exclusively operated by the state or by any county, municipality, or other governmental entity.

(f) The registration of a truck defined in § 320.08(3)(d).

(3) A refund of the fee imposed under subsection (1) shall be granted to anyone who, within 3 months after paying such fee, sells, transfers, or otherwise disposes of a motor vehicle classified in § 320.08(2), (3), or (9)(c) or (d) in any transaction not exempt from the fee pursuant to paragraph (2)(b), paragraph (2)(c), or paragraph (2)(d).

A person requesting a refund must present proof of having paid the fee pursuant to subsection (1) and must surrender the license plate of the disposed-of vehicle.

(4) A tax collector or other duly authorized agent of the department shall promptly remit all moneys collected pursuant to this section, less any refunds granted pursuant to subsection (3), to the department. The department shall deposit 30 percent of such moneys as they are received into the General Revenue Fund The remainder of the proceeds, after deducting the service charge imposed by § 215.20, shall be deposited into the State Transportation Trust Fund.

CHAPTER 96-243

Committee Substitute for House Bill No. 5

An act relating to refund of motor vehicle impact fees; directing the Department of Highway Safety and Motor Vehicles to refund the impact fee imposed on the initial application for registration of a motor vehicle pursuant to § 320.072(1)(b), F.S., from July 1, 1990, to June 30, 1991; providing for notice to appropriate state agencies of persons eligible for a refund; directing such agencies to notify the Comptroller of claimants who owe certain debts; directing the Comptroller to withhold refunds due such claimants and transmit such amounts to the appropriate agency; providing a time certain for refund eligibility; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. *(1) The Department of Highway Safety and Motor Vehicles is directed to establish a program for refund of the $295 impact fee upon the initial application for registration of a motor vehicle imposed pursuant to § 320.072(1)(b), Florida Statutes, as created by chapter 90-132, Laws of Florida, during the period July 1, 1990, through June 30, 1991, and to make such refunds from the General Revenue Fund in a timely manner.*

(2) It is the responsibility of the Department of Highway Safety and Motor Vehicles to provide the appropriate state agencies with a list of persons eligible for a refund of the impact fee. Within 30 days after receiving the list, the agencies shall notify the Comptroller of any claimant owing an outstanding debt to the state or who is delinquent in any court-ordered child support obligation. If the claimant owes multiple debts subject to offset under this subsection and the refund is insufficient to cover all such debts, the amount of the refund

shall be applied to those debts in the following manner: the amount of the refund shall first be applied to any delinquent court-ordered child support obligation; the remainder, if any, shall then be applied to any outstanding debts to the state that are the result of a felony conviction, as provided in § 960.17, Florida Statutes, during the period July 1, 1990, through June 30, 1996; and if the remaining portion of the refund is insufficient to cover all further debts subject to offset under this subsection, it shall be applied on a pro rata basis by the Comptroller. The pro rata allocation shall be based on the percentage of each debt owed of the total amount of all outstanding remaining debts owed. The Comptroller shall withhold the refund due to any such claimant and shall transmit such amount withheld to the respective agency.

Section 2. *All persons eligible for a refund of the $295 impact fee shall file an appropriate application for the refund with the Department of Highway Safety and Motor Vehicles within 1 year of the effective date of this act or shall otherwise forfeit such eligibility for a refund.*

Section 3. This act shall take effect upon becoming a law.

Approved by the Governor May 28, 1996.

Filed in Office Secretary of State May 28, 1996.

FILED
AUG 25 1999
OFFICE OF THE CLERK

(2)

No. 99-69

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

JUDITH A. NEMETH, DONALD J. NEMETH, and JOHN L. VITALE

Petitioners,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENTS' BRIEF IN OPPOSITION

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Commerce Clause 2,4

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Section 11.065,
Florida Statutes 5,13

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No. 99-69

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

JUDITH A. NEMETH, DONALD J. NEMETH, and JOHN L. VITALE

Petitioners,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In 1990, the Florida Legislature enacted legislation that imposed a $295.00 impact fee "upon the initial application for registration pursuant to s. 320.06 of every motor vehicle classified in s. 320.08(2), (3), and (9)(c) and (d)." Chapter 90-132, Section 74, Laws of Florida, was codified as Section 320.072(1)(b), Florida Statutes (Supp.

1990), and took effect on July 1, 1990. Section 320.072(1)(b), Florida Statutes (Supp. 1990), was subsequently repealed and superseded by Section 319.231, Florida Statutes (1991).[1/] Between July 1, 1990 and June 30, 1991, an impact fee of $295.00 was imposed upon the person registering the vehicle.[2/]

Mr. and Ms. Nemeth are residents of Florida. Both purchased vehicles in New Jersey. Both moved to Florida in 1990. On November 24, 1990, both registered their vehicles in Port St. Lucie, St. Lucie County, Florida. At the time of registration, both were required to pay $295 for the impact fee imposed by Section 320.072(1)(b), Florida Statutes, (Supp. 1990). Both later sought a refund of the impact fee they paid. The date they sought the refund was the date they

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[1/] Section 319.231, Florida Statutes, (1991), was struck in 1994 by the Florida Supreme Court as being in violation of the Commerce Clause. Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994).

[2/] Section 319.231, Florida Statutes (1991), imposed a $295.00 impact fee upon the initial "titling" of a motor vehicle, as opposed to Section 320.072(1)(b)'s imposition on "registration."

filed the suit in the Florida Circuit Court on October 4, 1994. They did not allege in the Complaint that they ever filed an application for a refund for the $295 impact fee with the Florida Department of Highway Safety and Motor Vehicles (DHSMV), or were denied a refund request, as required by Section 215.26, Florida Statutes.

During 1990, Mr. John L. Vitale moved from New York to Florida, and he registered his vehicle on January 7, 1991 in Port St. Lucie, St. Lucie County, Florida. He was required to pay all regularly required fees to title and register a vehicle imposed by Chapters 319 and 320, Florida Statutes, including the $295 impact fee imposed by Section 320.072(1)(b), Florida Statutes (Supp. 1990). Mr. Vitale paid the impact fee on January 7, 1991, and later sought a refund of the impact fee he paid. The date he sought the refund was the date he filed the suit in the Florida Circuit Court on October 4, 1994. Mr. Vitale did not allege that he ever filed an application for a refund for the $295 impact fee with the DHSMV or that he was denied a refund request, as required by Section 215.26, Florida Statutes.

The action was filed in the Circuit Court for the 19th Judicial Circuit, in and for St. Lucie County, Florida, on

October 4, 1994. Petitioners challenged the constitutionality of Section 320.072(1)(b), Florida Statutes (Supp. 1990), alleging that Section 320.072(1)(b), Florida Statutes (Supp. 1990), was in violation of the Commerce Clause, and infringed upon the right to travel.

Respondents responded to the Petitioners' complaint by filing a motion to dismiss. Respondents' motion was two-fold. First, the Respondents asserted that the Petitioners had not filed a written refund request with the Florida Comptroller as required by Section 215.26, Florida Statutes. Secondly, the Respondents asserted that the Petitioners did not file a refund application within the three (3) year time period from paying the fee or tax and were thus time barred from seeking any refund by Section 215.26(2), Florida Statutes.

A hearing was held on the Respondents' motion with the Circuit Court granting Respondents' motion and dismissing the action. However, the court allowed Petitioners the opportunity to file an amended complaint within ten (10) days of the Order.

Petitioners filed an amended complaint. The Petitioners asserted in their amended complaint that, in

addition to the same challenge raised in the first complaint, Section 215.26, Florida Statutes, was unconstitutional; that it was beyond the power of the Legislature to pass; that it denied Petitioners access to the courts; and, that it denied the Petitioners equal protection. In the Amended Complaint, Petitioners alleged they had no "predeprivational hearing" opportunity to challenge Section 320.072(1)(b), Florida Statutes (Supp. 1990), before paying the impact fee. Petitioners did **not** allege any additional or different facts from the original complaint.

Respondents again filed a motion to dismiss the amended complaint. The Circuit Court again granted the Respondents' motion to dismiss. Having not alleged that any action was taken by any of the Petitioners within three (3) years of paying the impact fee, the Circuit Court ruled that the Petitioners were timed barred from seeking a refund. The Petitioners appealed the decision of the Circuit Court to Florida's Fourth District Court of Appeal.

After appeal, but before the decision of the Fourth District Court of Appeal, Petitioners sought redress from the Florida Legislature in the form of a claims bill, pursuant to Section 11.065, Florida Statutes. That claims bill authorized

the refund of the impact fee for those who paid it pursuant to Section 320.072(1)(b), Florida Statutes (Supp. 1990). The Florida Legislature, in 1996, passed the requested claims bill. See Chapter 96-243, Laws of Fla. (1996). That act became law on May 28, 1996, and was in effect until May 28, 1997.

On January 22, 1997, the Fourth District Court of Appeal reversed the decision of the circuit court. Nemeth v. Department of Revenue, 686 So. 2d 778 (Fla. 4th DCA 1997). The Fourth District ruled that the Supreme Court of Florida's decision in Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994), had overruled its earlier decision in State ex rel. Victor Chemical Works v. Gay, 74 So. 2d 560 (Fla. 1954). In so holding, the District Court negated any requirement to file a refund claim under Section 215.26, Florida Statutes, or to file such a claim with 3 years of the date of payment as required by Section 215.26(2), Florida Statutes. However, to clarify the matter the District Court certified the following question to the Supreme Court of Florida as one of great public importance:

> WHETHER DEPARTMENT OF REVENUE V. KUHNLEIN, 646 So. 2d 717 (Fla. 1994) OVERRULED OR RECEDED FROM STATE EX REL. VICTOR CHEMICAL WORKS V. GAY, 74 So. 2d 560 (Fla. 1954) TO THE

EXTENT THAT VICTOR CHEMICAL HOLDS THAT THE RIGHT TO A REFUND OF TAXES IS BARRED IF THE TAXPAYER FAILS TO MAKE A TIMELY CLAIM FOR REFUND AS PROVIDED IN SECTION 215.26, FLORIDA STATUTES?

The State sought review of this certified question, which was granted.

On April 8, 1999, the Supreme Court of Florida decided the case of Department of Revenue v. Nemeth, __ So. 2d __, 24 Fla. L. Weekly S160 (Fla. 1999) (Pet. App. 1-11), clearing up the confusion left by the Kuhnlein decision. The Supreme Court knew it had before it a class action suit, brought by the Petitioners, in which none of the Petitioners or other potential member of the class had yet filed a written refund claim pursuant to Section 215.26, Florida Statutes. Furthermore, all of the persons who had ever paid the fee under Section 320.072(1)(b), Florida Statutes (Supp. 1990), including the Petitioners, were jurisdictionally barred from seeking a refund, pursuant to Section 215.26, Florida Statutes.

The Supreme Court of Florida specifically addressed two issues in its decision. First, that Court reexamined the procedures to seek a refund of taxes paid, who had to comply

with those procedures, and under what circumstances. Second, the Supreme Court examined the time period in which a refund application had to be filed, an examination in detail that had not been done since 1954 in Victor Chemical.

While the Court upheld the vast majority of Section 215.26, Florida Statutes, as written, the Court did expressly hold that it had earlier reinterpreted Section 215.26, to allow a limited exception to the exact compliance with the legislative provisions of Section 215.26, Florida Statutes, as discussed in Victor Chemical some 45 years ago. The exception, emanating from Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994), allowed for the "direct filing" of a tax refund case under very specific circumstances. This decision was based upon the Court's interpretation of Florida law.

The Supreme Court of Florida set out two necessary conditions that must be present before its direct-file exception could be utilized; the first that the tax itself must be challenged as unconstitutional and the second that the tax must have been paid "involuntarily" as opposed to a voluntary payment. Thus, **both** conditions or circumstance **must** be present before a taxpayer could utilize the "direct

file" exception.

Next, the Supreme Court of Florida examined the issue of the time limitations in which to file such a tax refund lawsuit, under Section 215.26, Florida Statutes, or the "direct-file" exception. It is that part of the Nemeth decision that is at question here.

The issue before the Supreme Court was whether the time limits of Section 215.26(2), Florida Statutes, had been suspended or negated by the prior Kuhnlein decision. The Court first recognized that the issue had not been addressed in Kuhnlein. See, Pet. App. 5-7.

The question of a timely filing is one of the primary issues raised by the Petitioners. The Supreme Court of Florida resolved the confusion by stating that a taxpayer suit under the exception

> must be commenced by filing in the appropriate court within the time requirements set forth in section 215.26(2), that is, "within 3 years after the right to refund has accrued."

Pet. App. 7-8. The Supreme Court then clarified the Kuhnlein decision by stating:

> Our holding in Kuhnlein **did not eliminate the need to comply** with the time requirements in section 215.26. Instead, we merely found that meeting the administrative requirements of

> section 215.26 was unnecessary. 646 So. 2d at 720. (e.s.)

Pet. App. 8.

The Supreme Court concluded its ruling on timely compliance by stating

> Therefore, we now explicitly hold that a plaintiff challenging the constitutionality of a tax statute and seeking a refund, while not required to file with the Comptroller, must still file suit within three years of payment as required by section 215.26(2).

Pet. App. 8.

In conclusion, after Nemeth, only a "facial" constitutional challenge to the tax itself, when the tax was involuntarily paid, may be brought directly in a circuit court. Even then, the taxpayer

> while not required to file with the Comptroller, must still file suit within three years of payment as required by section 215.26(2).

Pet. App. 8.

Though not necessary to the determination of the certified question before it or an interpretation of Section 215.26, Florida Statutes, the Supreme Court of Florida also addressed the due process aspects of the post-deprivational procedures and time limits in Florida's refund statute. The Court determined Florida's refund law met this Court's

mandate of providing a meaningful backward-looking relief or a clear and certain remedy, as announced in McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990) (McKesson), by stating:

> We find that section 215.26 provides adequate post-deprivation relief so as to comport with federal due process standards. We reach this conclusion primarily because McKesson refers to section 215.26 as an example of a statute that imposes permissible procedural requirements on post-deprivation relief. 496 U.S. at 45 n.28; see also Newsweek, Inc. v. Florida Department of Revenue, 118 S. Ct. 904, 905 (1998) (noting that Court has interpreted section 215.26 as providing "a postpayment remedy").

Pet. App. 9. Finally, the Supreme Court stated "we believe that Florida, as evidenced by our decision in Kuhnlein, not only satisfies McKesson's due process requirements but indeed provides broader post-deprivation relief to taxpayers who meet the requirements outlined above." Pet. App. 10.

REASONS FOR DENYING THE WRIT

There are two reasons for denying the writ. The first reason is that during the pendency of the action in the Florida court system, the Petitioners went to the Florida Legislature and secured, under Florida law, a claims bill that provided to the Petitioners all of the relief they sought in this litigation, a full refund of their $295 impact fee.

The second reason is that the decision of the Supreme Court of Florida below was based strictly upon state law matters, adequate and independent of any federal ground. The Supreme Court of Florida based its decision primarily upon a clear reading of the time limitations for filing a request for a refund, contained in Florida's refund statute, Section 215.26, Florida Statutes. Petitioners failed to meet the statutory requirements of Section 215.26, Florida Statutes, by failing to timely request a refund. Stated simply, the Petitioners did not timely file a refund application, pursuant to Section 215.26, Florida Statutes. The Petitioners' suit was properly dismissed by the Circuit Court and subsequently affirmed by the Supreme Court of Florida. The decision below was not grounded in federal law.

I. PETITIONERS HAVE ALREADY RECEIVED THE RELIEF THEY SOUGHT

The first reason for denying the writ is that during the pendency of the action in the Florida court system, the Petitioners went to the Florida Legislature and secured, under Florida law, a claims bill that provided to the Petitioners all of the relief they sought in this litigation.

It was disclosed by the Petitioners at oral argument

before the Florida Supreme Court that the Petitioners had received refunds of their $295 impact fee. After appeal, but before the decision of the Fourth District Court of Appeal, Petitioners sought redress from the Florida Legislature in the form of a claims bill, pursuant to Section 11.065, Florida Statutes. That claims bill authorized the refund of the impact fee for those who paid it pursuant to Section 320.072(1)(b), Florida Statutes (Supp. 1990). The Florida Legislature, in 1996, passed the requested claims bill. See Chapter 96-243, Laws of Fla. (1996). That act became law on May 28, 1996, and was in effect until May 28, 1997.

The receipt of the refunds by all of the class members was as a result of a legislative claims bill. In the claims bill itself, the legislature directed the Department of Motor Vehicles and Highway Safety to establish a refund program for taxes paid pursuant to section 320.072(1)(b), Florida Statutes (Supp. 1990), between July 1, 1990 and June 30, 1991. See, Chapter 96-243, Section 1, Laws of Fla. (1996). The Supreme Court noted this fact in its decision. See, Pet. App. 7, n.5.

Because the Petitioners have received all the relief they have ever sought, there is no need for this Court to

review the matter further. See, Powell v. McCormack, 395 U.S. 486, 495-501 (1969) (A case is considered moot when issues presented are no longer "live" or parties lack legal cognizable interest in outcome.)

II. THIS CASE WAS DECIDED SOLELY ON MATTERS OF STATE LAW

It is axiomatic that this Court has no jurisdiction when the decision sought to be reviewed has been decided on state law. This Court has long held that where the decision below rests upon an adequate and independent state ground, this Court will deny review of the matter. See, e.g., Lambrix v. Singletary, 520 U.S. 518 (1997); Coleman v. Thompson, 501 U.S. 722 (1991). As this Court just recently stated in Lambrix:

> In Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546, 2553, 115 L.Ed.2d 640 (1991), we reaffirmed that this Court "will not review a question of federal law decided by a state court if the decision of that court [520 U.S. 523] rests on a state law ground that is independent of the federal question and adequate to support the judgment." See also Harris v. Reed, 489 U.S. 255, 262, 109 S.Ct. 1038, 1042-1043, 103 L.Ed.2d 308 (1989). We in fact lack jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory. Herb v. Pitcairn, 324 U.S. 117, 125-126, 65

> S.Ct. 459, 462-464, 89 L.Ed. 789 (1945); see also Sochor v. Florida, 504 U.S. 527, 533-534, and n. *, 112 S.Ct. 2114, 2119-2120, and n. *, 119 L.Ed.2d 326 (1992).

Lambrix v. Singletary, 520 U.S., at 522-523.

For this Court to have jurisdiction the case below must first have decided a question of federal law and that the state ground is not independent of the federal question. Arizona v. Evans, 514 U.S. 1 (1997); Ohio v. Robinette, 519 U.S. 33 (1996). The test to make that determination was established in Michigan v. Long, 463 U.S. 1032 (1983). This Court held when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." Id., 463 U.S. at 1040-1041,

The decision below is one that rests upon an adequate and independent state ground. The Supreme Court of Florida based its entire decision on Florida law. The interpretation of Section 215.26, Florida Statutes, and its meaning was not

based on any federal constitutional provision or upon any federal law. The Florida Supreme Court below merely clarified the State's refund statute as to where and when a refund claim must be filed in order to preserve the claim.

There is no question that the Supreme Court of Florida did have a discussion in its opinion entitled "Federal Due Process Requirements." Pet. App. 9. However, this discussion was extraneous to the interpretation to Section 215.26, Florida Statutes, and is dicta. Had the Supreme Court of Florida left out this part of the opinion the decision would still have been the same. This discussion of federal law was neither material nor determinative of the issue before the Supreme Court of Florida.

This Court should refuse to consider the Petitioners' federal due process arguments.

CONCLUSION

The Department submits, for the foregoing arguments and authorities, that the petition for writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

JUDITH A. NEMETH, DONALD J. NEMETH and JOHN L. VITALE,

Petitioners,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ANSWERS TO NEW POINTS PRESENTED BY RESPONDENTS

Respondents, without response to the issues raised by petitioners' Petition have sought to raise the following two points in their Answer:

I. PETITIONERS HAVE ALREADY RECEIVED THE RELIEF THEY SOUGHT.

REPLY TO POINT I: Petitioners are gratified that respondents herein credit them with causing the passage of Chapter 96-243, Laws of Fla. (1996) calling for refunds for The *NEMETH* Class.

However, it cannot be said that full relief was afforded. The said refund statute was seriously deficient in the following ways:

1. Insufficient funds were appropriated to make a full refund to all aggrieved taxpayers;

2. No provision or appropriation was made for payment of interest after having raised about $30,000,000.00 about seven years earlier,

3. No provision or appropriation was made for payment of a reasonable attorney fee and

4. An inadequate less-than-one-year window for seeking refunds was afforded, when the-then refund statute called for a three year window of opportunity "after the right to a refund accrues" (meaning statutory right or court decision) without mention of date-of-payment of taxes. (Said statute now affords a five year window of

ANSWERS TO NEW POINTS PRESENTED BY RESPONDENTS – Continued

opportunity, from date of payment, within which to seek refund.)

II. THIS CASE WAS DECIDED SOLELY ON MATTERS OF STATE LAW.

REPLY TO POINT II: It is the height of irony in the instant case, for the State of Florida to argue that "there is no Federal Question Presented" when, via a single facially-invalid tax statute, it has deprived its citizens of money, and due process and in refusing to grant refunds following improper taxation in gross violation of the United States Constitution or to pay interest on the ill-gotten gains.

The Impact fee under challenge was deficient in the following regards (none of which defects are or can be defended by the respondents):

1. Failure to provide a pre-deprivation hearing in order to contest the tax before payment

2. Imposition of a "flat" tax without regard to:

A. Value or price paid of the auto or

B. The degree of "impact" of a small 4-cylinder car compared to an 8-cylinder, heavy gas-guzzler

3. No showing that a car from out-of-state would have an "impact" greater than an auto previously registered in Florida and

4. Credit against the Impact Fee was allowed only for Florida Sales taxes paid, granting a preference to

ANSWERS TO NEW POINTS PRESENTED BY RESPONDENTS – Continued

Florida dealerships, constituting a federally impermissible tax on interstate commerce.

The presence of any one of the aforementioned defects presents a very serious "Federal Question."

The presence herein, however, of *all* of the listed defects gives rise to what can only properly be described as "a facially unconstitutional" statute.

REASON[illegible]FOR GRANTING THE WRIT

Following even the most casual reading of the *McKESSON* and *NEWSWEEK* decisions, we are constrained to conclude that the State of Florida has, again, made the United States Supreme Court an involuntary third level of appeal for its citizens. In each of those cases, the aggrieved taxpayer was consistently denied relief by the state courts and agencies . . . and justice was achieved only after each matter was brought into the federal arena.

Both the *McKesson* and *Newsweek* decisions very plainly and clearly require that states must provide meaningful backward looking relief, (both cases arose in Florida) and both cases hold that states must provide a remedy for improper taxation that is "clear and certain."

Our experience and legal research, however, has shown us that the only thing that is "clear and certain" about the Florida refund process is that the victimized taxpayer "clearly and certainly" will not get a refund.

(Note: Neither of the Nemeths has received a refund. This question was asked by the court below during oral argument and it was answered by undersigned counsel, who responded: "No, Your Honor, they have not.")

(OFFER AND QUESTION: If the respondents can produce a cancelled refund check by the Nemeths, then petitioners are prepared to apologize and make serious concessions herein. But if the respondents cannot

produce any such cancelled check, are the respondents prepared to apologize and offer serious concessions?)

CONCLUSION

Petitioners respectfully request that the petition for a writ of certiorari be granted. In the alternative, petitioners request this Court to summarily reverse the Florida Supreme Court's decision for further consideration in light of *McKesson Corp v Division of Alcoholic Beverages*, 496 U.S. 18 (1990) and *Newsweek, Inc. v Florida Department of Revenue*, 118 U.S. 904 (1998) and an award of legal fees.

Respectfully submitted,

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